



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 7, 2004

Ms. Nancy Nelson
Associate Vice President, Employee Relations
El Paso County Community College District
P. O. Box 20500
El Paso, Texas 79998-0500

OR2004-4595

Dear Ms. Nelson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203191.

The El Paso County Community College District (the "district") received a request for six categories of information relating to a specified complaint made concerning the requestor. You claim that the requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.026, 552.101, and 552.114 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by an interested third party. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we note that in Open Records Decision No.634 (1995), this office concluded that (1) an educational agency or institution may withhold information that is protected from disclosure by the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g ("FERPA") and that is excepted from disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions to disclosure, and (2) an educational agency or institution that is state-funded may withhold information that is excepted from disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception to disclosure. It appears from your representations that the district has withheld certain portions of the requested information pursuant to Open Records Decision No. 634 (1995) because the information constitutes "student records" that are excepted from disclosure under section 552.114 of the Government Code. We note that in withholding that particular information, the district must comply with FERPA guidelines.

In addition, we note that the district only submitted to us for review two sets of documents titled "Notes with informant" and "Notes of student interviews." We, therefore, presume that the district has already provided the requestor with any other responsive information that existed on the date that the district received this request, other than the "student records" that the district withheld pursuant to Open Records Decision No. 634 (1995). If not, then the district must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Next, we must address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed and state the exceptions to disclosure that apply to the requested information not later than the tenth business day after the date of receiving the written request for information. *See* Gov't Code § 552.301(b). In addition, section 552.301(e) provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general (1) written comments stating the reasons why the stated exceptions to disclosure apply that would allow the requested information to be withheld; (2) a copy of the written request for information; (3) a signed statement of or evidence sufficient to establish the date that the governmental body received the written request; and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions to disclosure apply to which parts of the documents. *See id.* §552.301(e). You state that the district received this request for information on March 11, 2004. Therefore, the district had until March 25, 2004 to submit a request for decision to this office and state the exceptions to disclosure that apply to the requested information. Further, the district had until April 1, 2004 to submit to us for our review the items required to be submitted under section 552.301(e). However, we note that the district did not submit its request for decision to us until April 2, 2004 and did not provide us with any of the items required to be provided to us under section 552.301(e) until that same date. Accordingly, we conclude that the district failed to comply with section 552.301 of the Government Code in requesting this decision from us.

Because the district failed to comply with the procedural requirements of section 552.301 in requesting this decision from us, the information at issue is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The district must demonstrate a compelling interest in order to overcome the presumption that the information at issue is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the district claims that a portion of the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the

common-law informer's privilege, we note that a claim under the informer's privilege may be waived by a governmental body, since the privilege belongs to the government. *See* Open Records Decision No. 549 at 6 (1990). In this instance, the district waived its interest in this claim by failing to comply with the requirements of section 552.301 of the Government Code. Accordingly, we conclude that the common-law informer's privilege cannot provide a compelling interest in this instance and that no portion of the submitted information may be withheld from the requestor on that basis. However, since the district also claims that portions of the submitted information are excepted from disclosure pursuant to sections 552.026 and 552.114 of the Government Code, we will address these claims.

Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides:

[t]his chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Under FERPA, "education records" are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

Generally, FERPA requires that information be withheld only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* 34 C.F.R. § 99.3 ("personally identifiable information" under FERPA includes, among other things, "[o]ther information that would make the student's identity easily traceable"); *see also* Open Records Decision Nos. 332 at 3 (1982), 224 (1979) (finding student's handwritten comments making identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA), 206 at 2 (1978). Based on your arguments and our review of the submitted information, we have marked the portions of the submitted information that are confidential under FERPA. *See* Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978). Accordingly, we conclude that the district must

withhold this particular marked information pursuant to section 552.114 of the Government Code and FERPA.

Finally, we note that portions of the remaining submitted information may be excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential pursuant to section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time that the request for it is received by a governmental body. *See* Open Records Decision No. 530 at 5 (1989). Thus, the district may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received by the district. The district may not withhold such information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential. Accordingly, we conclude that the district must withhold the portions of the remaining submitted information that we have marked under section 552.117(a)(1) of the Government Code provided that the current or former employee with whom the information is associated timely elected under section 552.024 to keep that information confidential.

In summary, the district must withhold the information that we have marked pursuant to section 552.114 of the Government Code and FERPA. The district must withhold the information that we have marked pursuant to section 552.117(a)(1) of the Government Code provided that the current or former employee with whom the information is associated timely elected under section 552.024 of the Government Code to keep that information confidential. In any event, the district must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

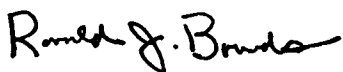
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 203191

Enc. Marked documents

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